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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1381

ROBERT GEORGE DRUMMOND and MILDRED PAULINE DRUMMOND,

Petitioners,

versus

FULTON COUNTY DEPARTMENT OF FAMILY & CHILDREN'S SERVICES, VALLIE STATON, Director, and KAY DALLINGER, Supervisor; DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF GEORGIA, JIM PARHAM, Director, JACK WATSON, Chairman of the Board,

and TIMOTHY LEE HILL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ROBERT GEORGE DRUMMOND, et al.,

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FULTON COUNTY DEPARTMENT OF FAMILY & CHILDREN'S SERVICES, et al., etc.,
and TIMOTHY LEE HILL,*

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals entered in the above-styled cause on November 28, 1977.

OPINIONS BELOW

The en banc opinion of the United State Court of Appeals is reported at

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* Timothy Lee Hill is listed as a respondent pursuant to Rule 21.4 of this Court. However, this party's interests are highly aligned with petitioners herein and it is expected that his court appointed counsel will file a separate petition.

563 F.2d 1200 and is reproduced beginning at page A.1 of the petition appendix.* The panel opinion of the United States Court of Appeals for the Fifth Circuit is reported at 547 F.2d 835 and is reproduced at A.61. The order of March 28, 1977, granting rehearing en banc of that opinion, is reported at 547 F.2d 861 and is reproduced at A.148. An opinion of that court vacating a stay previously issued by that court is reported at 532 F.2d 1001 and is reproduced at A.149. The opinion of the United States District Court for the Northern District of Georgia dismissing the complaint is reported at 408 F.Supp. 382 and is reproduced at A.153.

The opinion of the Supreme Court of Georgia in a collateral case is reported at 237 Ga. 449, 228 S.E.2d 839 (1976), and is reproduced at A.157.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 28, 1977. By order of February 22, 1978, Justice Lewis F. Powell, Jr., extended the time for filing a petition for writ of certiorari to and including March 29, 1978. This Court has jurisdiction under 28 U.S.C. §1254(1).

* Because of the length of the opinions below, the appendix to this petition is separately bound. References to that appendix will be "A.___."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*Section one of the Fourteenth Amendment of the Constitution of the United States

Georgia Laws of 1941, pp. 300, 303, Georgia Code 74-409, Request for Investigation; Georgia Laws of 1941, pp. 300, 303, Georgia Code §74-410, Investigation by Department of Human Resources or other agency; Georgia Laws of 1941, pp. 300, 303, Georgia Code §74-411, Report by investigating agency. The above Georgia statutes were repealed or modified by the following, effective January 1, 1978:

Georgia Laws of 1977 - Adoption Act of 1977, Act No. 85, Section 1, comprehensively revising Code of Georgia, Chapter 74-4.

§74-409 Investigation by Department of Human Resources or Other Agency, pp. 215-16.

§74-410 Report and Recommendation, pp. 216-17.

Georgia Laws, 1927, pp. 272, 277, Georgia Code §53-312,"White person" defined.

Georgia Laws 1865-6, p. 239; 1927, p. 272, Georgia Code §79-103, Persons of Color, who are.

*These provisions are reproduced in the petition appendix beginning at A.179.

QUESTIONS PRESENTED FOR REVIEW

I. Whether petitioners have a protected liberty interest under the Fourteenth Amendment when a state agency seeks to remove a foster child from their home and refuses consent for petitioners to adopt that child after his natural parents' rights had been terminated and the child had been in their home from age 28 days to two and a half years.

II. Whether the petitioners have a protected liberty interest under the Fourteenth Amendment where the actions of the state reflected negatively on them, were challenged as being inaccurate, were made in the course of denying them a benefit, and were recorded for potential future use to the detriment of petitioners.

III. Whether petitioners have a justifiable expectation that a mixed race foster child would not be removed from their home because of his race when the state, despite its racial practices, placed the child in their home and acquiesced in petitioners' refusal to sign an agreement that the child could be removed without explanation.

IV. Whether the consideration of race in the placement for adoption of a mixed race child was impermissible in violation

of the equal protection clause of the Fourteenth Amendment.

V. Whether when race was admittedly used in a decision by a state agency, the state should be required to show a substantial and compelling state interest in its use of race and whether the petitioners should be allowed to rebut those facts or show the detrimental effects of the use of race.

VI. Whether the procedures used in deciding to remove the child from petitioners' home and refusing consent to adopt accorded petitioners due process of law under the Fourteenth Amendment.

STATEMENT OF THE CASE

Petitioners, Robert George and Mildred Pauline Drummond, are husband and wife and had the care of Timothy (Timmy) Lee Hill from December, 1973 to May, 1976, or from age twenty-eight days to two and a half years. He was their foster child, placed in their care by the respondent Fulton County Department of Family and Children's Services of the Department of Human Resources of the State of Georgia.

The parental rights of Timmy's natural parents were terminated by court order and the Drummonds sought to adopt him. The Drummonds are Caucasian. Timmy's natural mother is also Caucasian; the race of his natural father has never been determined with certainty, but respondents believe him to be Negro and have acted consistent with this belief. Timmy has olive skin, brown eyes, and brown curly hair.

Despite the agency's practice of making foster placements of Negro children in Negro homes, white children in white homes, and mixed race children in Negro homes (T. 102), Timmy was placed with the Drummonds because the agency was not at first aware of his mixed race. The Drummonds refused to sign a standard contract agreeing not to try to adopt Timmy, and to surrender custody at the

agency's request regardless of reason. Only when the Drummonds sought to adopt Timmy did the department decide to use race as a reason for removal.

As early as March, 1975, respondents informed the Drummonds that "Timothy would, in our opinion, make a better adjustment and have a better chance in life with a Black couple in the Black community." A.70. Respondents rejected the Drummonds' request to adopt Timmy, in large part, if not solely, because of race, and this litigation was instituted in January, 1976.

Procedural Background

The complaint alleged that the decision was based solely on race, but the litigation has proceeded under the cause of action that race was impermissibly used, even if not the sole factor in the decision not to allow the Drummonds to adopt Timmy. The complaint alleged that the decision denied the Drummonds equal protection and due process of law. The Drummonds did not seek to represent Timmy in court, but sought the appointment of a guardian ad litem.

Trial on the merits was held nine days after the complaint was filed, the trial being consolidated with the hearing on motion for preliminary injunction over the

objection of both parties. The district court dismissed the complaint at the conclusion of the plaintiffs' evidence ruling that while race was used, it was not used as an automatic criterion but was directed to determining what was best for the child. The district court refused to consider the due process claim believing that this was an allegation that state law had been violated, and should be presented to the Georgia courts.

The Drummonds then filed a complaint in the Superior Court of Fulton County, Georgia. The Georgia courts rejected their claims, ruling that the Drummonds did not have standing to challenge the respondents' decision to withhold permission to adopt Timmy. Drummond v. Fulton County Department of Family and Children's Services, 237 Ga. 449, 228 S.E.2d 839 (1976), cert.den., 432 U.S. 905 (1977).

The Drummonds simultaneously pursued their appeal to the United States Court of Appeals for the Fifth Circuit, where, as prayed for in the complaint, an attorney was appointed to represent the interests of Timmy. After interim stays by both federal and state courts, Timmy was removed from the Drummonds' home in May, 1976.

The court of appeals reversed the district court on February 2, 1977, in an opinion authored by Judge Elbert P. Tuttle. The majority found that the Drummonds presented a claim for protection of a liberty interest encompassed by the Fourteenth Amendment. It also found that quite apart from the due process claim, the issue of the consideration of race presented a claim under the equal protection clause of the Fourteenth Amendment. The court directed that the mandate issue immediately for further proceedings and that Timmy be allowed to intervene.

The original complaint alleged jurisdiction and a cause of action under 28 U.S.C. §1343(4), 42 U.S.C. §1983 and the Fourteenth Amendment.[1]

The en banc court affirmed the dismissal by the district court, ruling that the Drummonds had no liberty interest to be protected and that race was properly used in rejecting the Drummonds' request to adopt Timmy. The court went on to rule that

1. On remand the plaintiffs amended their complaint asserting claims under, inter alia, 42 U.S.C. §§1981 and 2000d. Only the mandate was thereafter recalled and not the additional developments in the record. Therefore, no court has yet ruled on plaintiffs' claims alleging unequal racial treatment specifically prohibited by federal statute.

if the Drummonds did have a liberty interest, the procedures afforded them complied with due process. The two members of the panel majority dissented, and another judge dissented from the finding that the procedures met due process requirements.

Factual Background

Georgia law provides no procedures for the protection of foster parents. In the present posture of this litigation, the issue is now one of post-removal procedures in the foster care system and the procedures regarding efforts to adopt children.

The care provided Timmy by the Drummonds has been, undisputedly, excellent. There is similarly no dispute that the removal of Timmy from the Drummonds' home would be and has been traumatic both for Timmy and the Drummonds.

The Application of Racial Policy

When the Drummonds made known their desire to adopt Timmy, an initial and perhaps final decision was made that Timmy would be better off raised by Negro parents.

This reasoning was consistently stated in writing and recorded in respondents' memoranda. Respondents have taken the position that what they meant by those statements was that this child would be

better off raised by someone else than the Drummonds and that the likelihood would be that the home found for Timmy would be a Negro home.

Though discovery was abbreviated, the following facts or claims appear in the record from respondents' documents and interrogatory answers.

1. Prior to 1968, the defendant agency was segregated on the basis of race. Plaintiffs' Exhibit 24.

2. Fulton County has placed only two Negro children for adoption with white couples. One was in 1968 and one was in 1969. Ibid.

3. The placement of those children was made "when sufficient black homes [were] not available" and "a great deal of opposition resulted from the black community and social work organizations." Plaintiffs' Exhibit 15.

4. The defendant agency classified "all children with any discernable [sic] Negroid characteristics" as Negro pursuant to state law. Plaintiffs' Exhibit 24.

5. Beginning in 1968, mixed race children were so classified. Thirty-two mixed race children were placed by the respondents between 1968 and 1975,

twenty-nine of these were black/white. Plaintiffs' Exhibit 24 shows as follows:

Year	Number of Black/White Children	Black Home	White Home
1975	3	2 or 3*	0 or 1*
1974	5	5	0
1973	5	4	1
1972	2	1 or 2*	0 or 1*
1971	8	7	1
1970	3	3	0
1969	2	2	0
1968	1	0	1

The "Due Process" Afforded

When the Drummonds made known their desire to adopt Timmy, a "staffing" was held on March 10, 1975. The decision made by that group was that Timmy would be better off in a Negro home. No person at that meeting had personally met with either the Drummonds or with Timmy so it is uncontroverted that the initial decision to remove Timmy and place him elsewhere for

* The exhibit lists two black/white and one black/Korean for 1972. While two of the three were placed in a black home and the other in a white home, the exhibit does not show in which the black/Korean was placed. In 1975, three black/white children were placed, one black/Spanish/white, and one white/oriental (Japanese). For this year this is one placement listed as being in a white home and four in black homes. It is not shown which child had the white placement. The Caucasian/Japanese is not a "white person," but neither is he or she included in the definition of a "person of color." Georgia Code §§53-312, 79-103.

adoption was not made as the result of any factual evaluation, extensive or otherwise.

The Drummonds were called in and informed of the decision. There was no evaluation interview.

The Drummonds were never informed of what criteria would be applied to their request, what facts were deemed controlling, were given no opportunity to rebut those facts nor to present their case in person or through a representative. Georgia law is now settled that the procedures of the state provide them no such opportunity. And no matter what errors were made, what policies applied, what constitutional violations occurred, the Drummonds have no standing in any Georgia agency or tribunal to contest the results. And it is equally clear that Timmy likewise has no protections. His rights are deemed exercised and protected by the acts of respondents, whose discretion is total.

Georgia law gives no rights to foster parents regarding their continuing care for a child placed in their home. The standard contract between foster parents and the

state agency (which the Drummonds did not sign), recites that the foster parents agree "[t]o release the children to the County Department upon its request regardless of the reason." Defendants' Exhibit 4.

During the annual review of their home to see if the Drummonds should continue to be certified as foster parents (not merely for Timmy, but as a resource for the agency), the Drummonds' relationship with Timmy was observed by a foster care worker, Barbara (Hauben) Osgood. She reported their continuing desire to adopt Timmy and subsequently an adoption interview with the Drummonds was conducted in the agency office and separate from Timmy. Timmy was evaluated for adoption at about this time because the parental rights of his natural parents had then been terminated.

Then came the staffing attended by nineteen people. Ms. Osgood was not invited to that staffing though she had been working with the family for some time and had observed the Drummonds and Timmy in their home.

While Timmy remained in the home of the Drummonds for two and a half years, contact between the home and the agency was extremely limited. Contact consisted of telephone calls and an annual evaluation of the home as a foster home. The sum total of the fact gathering that went into any decisions through October of 1975 was (1) the March 11, 1975 meeting in which the initial decision was explained to the Drummonds, (2) the discussion which occurred during the annual foster home re-evaluation on August 25, 1975 (Plaintiffs' Exhibit No. 9, a six page form), (3) a psychological evaluation of Timmy on July 22, 1975 (Plaintiffs' Exhibit 6, a page and a half report), (4) a social study of the child on October 3, 1975 (Plaintiffs' Exhibit 13, a three page form), (5) the evaluation interview with the Drummonds the same date (Plaintiffs' Exhibit 14), and (6) the meeting on October 11, 1975, in which the decision was explained to the Drummonds.

Of the nineteen persons involved in the October 10, 1975 staffing, there were no psychiatrists, only one person known to be a psychologist and the rest were foster care and adoption social workers

and administrative personnel. There is nothing in the record to reflect their experience or qualifications, but a degree in social work is not a prerequisite for the position of social worker. There is no indication that any of the participants had ever dealt with any placement for adoption of a mixed race child, much less any placement of such a child in a white home.

REASONS FOR GRANTING THE WRIT

I. This case presents a question left open by this Court's decision in Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977) -- whether or not there is a protectable interest in a foster family relationship that existed for thirty months when a state agency seeks to remove an infant child from his foster home to place him elsewhere than with his natural parents.

Petitioners assert that their home consisted of a psychological family because Timmy remained in their care from age one month to two and a half years. The parental rights of Timmy's natural parents were terminated and his removal from the home would be to other foster parents or adoptive parents; it would not be to return to his natural parents.

The court of appeals squarely concluded "that the Drummonds have no protectable liberty interest in this case." A.20.

> [W]e hold that Timmy has no liberty interest as asserted here. This decision by its facts is necessarily applicable only to an infant of tender years placed in a foster home for the length of time and under the circumstances here

> involved. We cannot by decision here address every conceivable situation, in some of which a child may have acquired some interest, as alluded to in Justice Brennan's opinion in OFFER. A.22-23.

Justice Brennan alluded to "an infant, [who] has never known his natural parents, and has remained continuously for several years in the care of the same foster parents," 431 U.S. at 844, and where the proposed removal is not for the purpose of returning the child to his natural parents.

The court of appeals discussed two distinctions pointed out in OFFER between foster and biological families. A.14. The first, that foster parents often compete with natural parents seeking to assert a competing liberty interest, is totally absent from this case.

The second factor is that the usual familial relationship to be protected is biological, while foster families are created by state law. Petitioners argued below that while family protections are usually based in biological families, this Court has repeatedly given weight to factors which are not blood based, but are the result of a family relationship despite the

legal nature of its origins. E.g., Levy v. Louisiana, 391 U.S. 68, 72 (1968); Stanley v. Illinois, 405 U.S. 645, 652 (1972). The importance of the caring for children, not merely being a biological parent, was emphasized in Quilloin v. Walcott, ___U.S. ___, 98 S.Ct. 549 (1978).

The court of appeals concluded that because foster care is intended to be temporary, is a creature of state law, and has never been recognized as the equivalent of the natural or adoptive family, it is "limited by the very laws which create it." A.17. The court did not discuss the fact that the agency altered its practice and allowed a mixed race child to remain with a white family and that the family refused to agree that the child could be summarily removed without reason. When the child remained in the home for two and a half years and the agency had acceded to the refusal to sign the agreement, the Drummonds assert a justifiable expectation that race would not then be used as a reason for removing the child from the home.

But the court of appeals concluded that neither the Drummonds nor Timmy have a liberty interest to be protected based on their psychological family. This decision, in view of the facts presented, merits plenary review by this Court.

II. The court of appeals misinterpreted recent decisions of this Court in deciding that no liberty interest exists when the state denied a benefit and recorded its reasons therefor.

The Drummonds' claim of a liberty interest has a second component, that the action complained of attached a disability.

In rejecting the claim of the Drummonds' liberty interest, the court of appeals relied on Paul v. Davis, 424 U.S. 693 (1976), Codd v. Velger, 429 U.S. 624 (1977), and Bishop v. Wood, 426 U.S. 341 (1976), concluding that to state a claim for denial of a liberty interest, the Drummonds had to "have been denied a right previously recognized by the state in conjunction with a defamatory finding about them," "challenge this finding as factually inaccurate," and there "must be some publication of the defamation outside the context of litigation." A.18.

It is a complete misreading of Paul v. Davis to hold that no liberty interest can be claimed unless there existed a defamation of some sort. Paul v. Davis does not support this conclusion, and this reasoning is in conflict with Board of Regents of State Colleges v. Roth, 408 U.S. 563, 573-74 (1972), where it is recognized that if the state had imposed on Roth "a stigma or other disability"

beyond the denial of a benefit, a protected liberty interest would likely be presented. (Emphasis supplied.)

Petitioners do assert that a stigma has attached--that because they are Caucasian they are less qualified than is a Negro family to parent a mixed race child. But they do not limit their claim to the existence of a stigma, for it is clear that a disability has attached. The state, by statute, must file a report on any adoption petition filed within Georgia. Ga. Code §§74-409, 74-410, A. 182-86. Until recently, that report was required to include the agency's opinion on the "racial suitability" of the home. A. 182. That language has now been modified, but the report may still include such an opinion. Since the state agency has already made a negative record in this case and recorded it giving potential for future use, it is clear that the finding here can be used against the Drummonds in the future. Thus they state a cause of action for denial of a liberty interest. Bishop v. Wood, supra; Goss v. Lopez, 419 U.S. 565, 575 (1975).

The court of appeals did not discuss this contention but rather misinterpreted Bishop v. Wood as requiring public dissemination of the negative information. The

Drummonds, of course, never claimed there was dissemination as public as that in Wisconsin v. Constantineau, 400 U.S. 433 (1971), or Paul v. Davis, supra. But this is not required under the decisions of this Court, particularly Goss v. Lopez, supra, for it was recorded for future use.

Lastly, the court of appeals concluded that the Drummonds "have not alleged any particular factual errors in the agency's information and findings," A. 19, as required by Codd v. Velger, supra. Quite the contrary, the Drummonds argued that the agency made a number of factual errors and omissions which could be corrected by providing them due process. There are alleged factual errors in regard to the agency misapplying its age policy, that the agency made errors about the community in which the Drummonds lived, about their racial attitudes, about Mrs. Drummonds' health, etc. Moreover, there is the claim challenging the racial policy of the agency.[1]

The opinions of this Court suggest that a liberty interest may exist if a

1. The court of appeals' conclusion is inexplicable, and is not protected by the two court rule, Neil v. Biggers, 409 U.S. 188 (1972), because no findings were made by the district court on this point.

state authority, in denying individuals a benefit, makes any findings or acts on facts which are derogatory to them or which they claim are incorrect. If the state authority then publicly disseminates the reasons for its actions, records the information which carries with it the potential for future harm or if the actions also encumber the individuals in seeking similar benefits, then they are entitled to a hearing.

The Drummonds were denied a benefit, assert the state's reasons and factfinding are erroneous, the information was recorded and carries with it the potential for future harm. The Court should grant plenary review to examine the interpretations of its decisions made by the court of appeals.

III. This Court should consider whether the procedures afforded the petitioners and the child met due process requirements.

The court of appeals decided not only that there did not exist a liberty interest but that the procedures afforded by the state met the requirements of the due process clause of the Fourteenth Amendment. This latter finding was not in whole dicta,

because the finding of no liberty interest was hedged by the statement that "some might find a lesser interest in these facts deserving of some protection against arbitrary conduct." A.24. Additionally, the state conceded that the child had a due process interest when it sought rehearing en banc. A.43.

The court of appeals conclusion that the process was sufficient was on assumptions and findings wholly its own, for the district court did not address this claim.

The Georgia courts have affirmed that the agency's discretion to act is total. A.160. Georgia law provides no pre-removal or post-removal protections when a foster child is removed from the home, and persons seeking to adopt have no protections afforded by state law. The standard foster care contract demands the right to remove the child without reasons, a contract which was not signed here.

The Drummonds were given no reason for the removal save the consideration of race told them only after the decision to remove had been made. Essentially the only part the Drummonds played in the process was submitting to an adoption interview after the initial decision to remove was made. They were not told

the rules, were not invited to inform the agency if they thought the agency had made errors; they were not invited to submit facts they thought relevant. There is no administrative or judicial review in which they may participate. The system was limited, and essentially ex parte.

The court of appeals concluded, with no evidence to support the conclusion, that informality was the best method. It concluded that the "best interest of the child" was a subjective determination, A.26, 28, that could best be made by the assumed expertise of the agency.

Plenary review is merited to consider whether the state does provide due process by such an informal method in terminating a familial relationship.

IV. This Court should consider whether race played an impermissible part in the decision to remove Timmy from the Drummonds' home.

There is no question presented as to whether or not the petitioners established by evidence that there was an intent to use race by the state agency. A.7. Compare, Village of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977). But there remains the more diffi-

cult question of whether or not race may be used with a benign intent. Cf. Regents of University of California v. Bakke (No. 76-811). The court of appeals ruled that the consideration of race was devoted to finding Timmy the best possible home.

The Drummonds disputed the evidence on this conclusion, arguing that the evidence showed only that the agency had an automatic policy of placing any Negro child--and this included by the state's definition and actions a mixed race child--in a Negro home if one was available. If race may be used, petitioners urge that the state failed to establish by evidence the need for using race and that the petitioners should be provided the opportunity to show that the benign intent in fact works to the detriment of mixed race and Negro children.

The evidence of racial discrimination is set forth in the statement of the case. The district court concluded that because some mixed race children were placed in white homes that race was not used an an automatic factor. This conclusion is erroneous because there is no evidence that any mixed race child was ever placed in a white home unless there was an absence of a Negro

home to adopt the child.[1]

The conclusion that the use of race as a motivating factor is constitutionally permissible merits plenary review. While the racial classification are not per se unconstitutional, they are inherently suspect. Bolling v. Sharpe, 347 U.S. 497 (1954), and "they are unconstitutional unless the State can demonstrate that such laws are 'necessary to promote a compelling governmental interest.'" Dunn v. Blumstein, 405 U.S. 330, 342 (1972) (quoting Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (emphasis is the Court's). The burden is on the state. The state here has yet to advance what interest it is protecting by its use of racial criteria, much less establish by evidence the need to do so.[2]

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1. The state admitted applying such a policy in 1968 or 1969, and there is no evidence that this policy was terminated.

Further, the high ratio of placements in Negro homes established a presumption that Negro homes are favored and this is not rebutted by the approximately one placement per year in a white home. In order to have rebutted this evidence, the agency would have to have shown that Negro homes offer for adoption five to seven times more often than white homes do. Dothard v. Rawlinson, 433 U.S. 321 (1977).

2. By its own admission the agency has terminated the placement of Negro children in white homes because of objections from the Negro community

(Footnote continued on next page)

The Treatment of a Mixed Race Child as a Negro Child is Not Rational or is not Justified by This Record.

Moreover, Timmy is a mixed race child. He has been treated as if he were entirely descended from Negro parents. The state has given no consideration or explanation of why a mixed race child should be treated as identical to a Negro child. The court of appeals concluded that

> consideration of race in the child placement process suggests no racial slur or stigma in connection with any race. It is a natural thing for children to be raised by parents of their same ethnic background. A.9.

The court of appeals, as the agency itself, paid no heed to Timmy's mixed heritage.

The Agency's Policy is Detrimental to Negro and Mixed Race Children.

The petitioners contend that they were erroneously cut off in their proof. A.5. The court of appeals ruled that the advancement of the trial on the merits was a proper exercise of the district court's discretion "in view of the essentially legal

(Footnote continued from previous page)

and social workers. This, prima facially, violates the equal protection clause, Buchanan v. Warley, 245 U.S. 60 (1917); Cooper v. Aaron, 358 U.S. 1 (1958).

nature of the contest and the need for prompt action on this case." A.5. However, in its conclusions on the use of race and agency procedures, the court made extensive assumptions about racial matters concerning this family, agency, the status of racial tolerance in society, and it accepted the treatment of mixed race children as if they were Negro.

By seeking primarily to place these children in Negro homes, the result is that mixed race and Negro children remain longer in foster care and in fact make up a disproportionate percentage of the backlog in the placement of children for adoption.[1] The refusal to consider white homes as adoptive resources for such children may be detrimental to such children and deny them the equal protection of the laws.

The Drummonds have established that race was used, Village of Arlington Heights v. Metropolitan Development Corp., supra, and that that consideration of race was a substantial or motivating factor. Mt.

1. See, "Adoption Resources for Black Children," Children (Vol. 18, No. 2, March/April, 1971), 49; National Survey of Black Children Adopted in 1974, Opportunity (December 22, 1975).

Healthy City School District v. Doyle, 429 U.S. 274 (1977). This court should grant review to determine if race was in fact used in a manner which denied the Drummonds and Timmy the equal protection of the laws.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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